SUPREME COURT U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 349

WILLIAM E. THORESEN, III,

Petitioner,

vs.

THE HONORABLE WILLIAM GOODWIN,

Respondent.

In re Petition of WILLIAM E. THORESEN, III.

PETITIONER'S REPLY BRIEF

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We regret that we have been unable to pursuade the government to discuss either the ultimate or even the immediate issue in this case: In the ultimate sense, is the writ of habeas corpus available in any court, state or federal, to review the validity of a state criminal conviction obtained in violation of federal constitutional rights after the defendant has completely served his sentence or paid his penalty? In the more immediate sense, is the writ available in a federal district court to attack the validity of an allegedly constitutionally deficient prior state conviction where the federal prosecution is dependent upon the prior state conviction as a necessary predicate to the federal charges? Respondent does not deal with the larger question presented; we rest on our full development of the question in the petitions.* Respondent comes to grips only

*The government has not filed a response to the First Circuit Petition (No. 348).

obliquely with the more immediate question presented; in view of the importance of this question to petitioner and indeed to all persons who have been unconstitutionally convicted who are likewise subject to having that injury compounded by further government action, we are compelled to respond.

Petitioner's claims that he was deprived of counsel and that the property he allegedly stole was not of sufficient value to support jurisdiction for a felony conviction stand uncontroverted before this Court. Clearly the more serious of these two deprivations is the denial of right to counsel. In fact, this Court has stated in *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1934), that denial of right to counsel:

> "stands as a jurisdictional bar to a valid conviction. . . . If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus." 304 U.S. at 468.

The government's response to petitioner's contentions is twofold: first, whatever the teachings of *Peyton v. Rowe*, 88 S. Ct. 1549 (1968), and *Carafas v. Lavallee*, 88 S. Ct. 1556 (1968), one cannot wait indefinitely to attack by habeas corpus an allegedly invalid conviction, and petitioner waited too long; second, once the federal charges were filed in the Northern District, habeas corpus was no longer available because this would constitute a collateral attack on a state conviction, which cannot be done in the federal proceedings. And, in any event, this is all irrelevant because, even if the state conviction was void, under *DePugh v. United States*, 393 F.2d 367 (8th Cir. 1968), petitioner would still be liable under the Federal Firearms Act since the conviction was not attacked and set aside prior to the shipment of firearms.*

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* Petitioner believes that the government's reliance upon *DePugh* is misplaced. *DePugh* did *not* involve an alleged denial of a federal constitutional right, as is alleged by petitioner here. Whatever the ultimate disposition of the issues presented in *DePugh*, a person cannot be constitutionally convicted of a second crime based upon his status where that sta-

With reference to the government's contention that petitioner "waited too long," (which seems to admit, at least impliedly, that *Peyton v. Rowe, supra,* and *Carafas v. Lavallee, supra,* have sounded the death knell to the artificial "custody" requirement of prior decisions), the uncontroverted record demonstrates that petitioner did not realize that he was convicted of a felony until *after* the federal charges were filed.** As to the second contention, petitioner first attacked the Maine conviction in the Maine state and federal courts, the Maine state court holding that state law provided no remedy to review denial of federal constitutional rights after the sentence was served. The First Circuit held that this was also true of the federal courts, suggesting that the only possible place for such a challenge was California where the firearms indictment lay. Petitioner then attacked the conviction in the Ninth Circuit, but was told that no remedy exists in that Circuit either, except perhaps by way of review upon appeal after conviction.

Additionally, both the Ninth Circuit and the government have ignored completely this Court's decision in *Burgett v. Texas, supra,* which implies that a defendant has a right to a hearing *prior to trial* to inquire into the constitutional validity of a prior conviction which is being used as a predicate for a second criminal proceeding or for enhancement of punishment after a second conviction. Re-

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tus has been imposed upon him in a constitutionally defective criminal proceeding. Whatever *DePugh* may or may not stand for, it is clear that under *Burgett* v. *Texas,* 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), the government cannot use a conviction secured in violation of a person's Sixth Amendment right to counsel "either to support guilt or enhance punishment for another offense...." 88 S. Ct. at 262.

** The government says: "Before the indictment was returned in the Northern District of California, petitioner had made no attempt to establish the invalidity of the Maine conviction." (p.4). This ignores the fact that there were *two* indictments in the Northern District. The second indictment was not brought until *after* petitioner had begun his attack on the prior conviction. Upon learning of the alleged felony nature of the Maine conviction, petitioner immediately undertook investigation of the factual circumstances and, after securing numerous affidavits tending to establish the invalidity of the conviction, he began post-conviction proceedings in first the Maine state court and then the First Circuit.

spondent's statement that "petitioner will have a full opportunity to present [his] contention at trial" (p. 6), citing *Burgett, supra,* ignores the fact that *Burgett* appears to support a requirement of a hearing *prior to trial* and that the District Court has already denied petitioner such a pre-trial hearing and has strongly indicated that no hearing will be granted at trial. (See App., Br. Pet. p. 22-23).

We believe the decisions of the District Court, the Ninth Circuit and the response of the government in this case are reducible to one basic proposition: Even though the necessary predicate to the federal charge is a prior felony conviction, and even though that conviction may in fact be void, a person cannot stop a federal trial with a writ of habeas corpus, but instead must suffer the second conviction and then attempt to straighten the matter out on appeal. This approach contradicts the history and purpose of the writ of habeas corpus and ignores the Court's decisions in *Peyton v. Rowe, supra, Carafas v. Lavallee, supra,* and *Sibron v. New York,* 88 S. Ct. at 1899.

Petitioner's right to attack by habeas corpus his *status* as a convicted felon (which subjects him right now to all of the disabilities recognized in *Carafas*) is completely independent of his right to attack the conviction in the context of the federal firearms prosecution. *Burgett* is no limitation on the Great Writ. As this Court stated in *Sibron v. New York*:

> "The question of the validity of a criminal conviction can arise in many contexts, compare Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967) and [the] sooner the issue is fully litigated the better for all concerned. It is always preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy."

Had the courts of Maine and the First Circuit not thought themselves fettered by artificial and outdated concepts of "custody," petitioner would have had an opportunity to prove the constitutional invalidity of the Maine conviction prior to the filing of the second indictment in this case.

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The government states in its brief that petitioner has not directly attacked by habeas corpus the jurisdiction of the District Court to proceed with the Federal Firearms Act charges. While this is true in a technical sense, as a practical matter, petitioner has in fact claimed that the necessary predicate to the federal criminal proceedings—the Maine felony conviction—is void. If the District Court can proceed with the Federal Firearms Act charges when the necessary predicate therefor derives from a void conviction, this petitioner, like *Burgett*, "in effect suffers anew from the deprivation of his Sixth Amendment right." *Burgett, supra*, 88 S. Ct. at 262.

The path for this petitioner, like that of Carafas, has been long; we respectfully submit that law and justice require that he be given a hearing on the merits of his contentions now, not countless thousands of dollars and countless years from now. Habeas corpus means that this petitioner has a right to immediate hearing on his constitutional contentions.

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